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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

AGAINST

WILLIAM HENKEL, Marshal of the United States for the Southern District of New York, *et al.*,
Appellees.

APPELLANT'S BRIEF ON APPELLEE'S OFFER TO WITHDRAW WARRANT.

The appellant was arrested under a warrant issued March 16th, 1903. He was arraigned on this warrant before the Commissioner and demanded an examination, which was set for March 18th, 1903. On that day he moved for a dismissal of the complaint and for bail. Both motions were denied. Writs of *habeas corpus* and *certiorari* were then issued and argument was heard in the United States Circuit Court on March 23d, 1903. The writs were dismissed on March 30th, 1903, and papers were at once prepared to take an appeal to this Court, and such appeal was allowed and citations were issued on April 7th, 1903.

On March 31st, 1903, a new warrant was issued which charged the appellant with the same offense as he is charged in the warrant of March 16th, but which, in addition thereto, charged him with having made false entries on the books of the London and Globe Finance Corporation, Limited. The prisoner was arraigned on this warrant and an examination was demanded and was set for April 8th, 1903.

On March 31st, 1903, it was announced on behalf of the demanding government that it would abandon the proceedings instituted under the complaint of March 16th, and that it consented to the discharge of the prisoner from arrest under the warrant of that date. The Commissioner, however, stated that he was without power to discharge the prisoner, and declined to do so.

On April 8th, 1903, it was announced to the Commissioner that an appeal had been taken to this Court and that the citation, as well as the petition for appeal, had been served on the demanding government, and that a motion had been made returnable before this Court of April 13th, for a rule or order advancing the cause and setting it down for a prompt hearing. The counsel for the British Government thereupon renewed his motion for the discharge of the prisoner under the warrant of March 16th, but such motion was denied for lack of power on the part of the Commissioner.

On April 13th, 1903, the motion was made in this court to advance the cause and was granted, no opposition having been made, although a representative of the Department of Justice was present at the presentation of the motion.

On April 15th, 1903, the Commissioner announced that during the pendency of the appeal to this Court

he would not render any decision in the proceedings which were then before him, and that he would make no adjudication on the question as to whether or not the offense as to which the prisoner stood charged was extraditable until this Court should have determined this appeal. The following colloquy then took place:

"MR. UNTERMYER: Now, may I ask, Mr. Commissioner, if your hesitation to hear us now on the question of the extraditability of the offense is based upon the ground that that is to be presented to the Supreme Court?

"THE COMMISSIONER: I wish to have any light the Supreme Court can throw on that subject.

"MR. UNTERMYER: Will you then inquire of the counsel representing the Government whether they propose to present that question?

"THE COMMISSIONER: No, I will not. I consider the complaint is before the Supreme Court, and when they act I will be in a position to decide."

Subsequently Mr. Fox said:

"As this case was taken up at the suggestion and the demand, I might say, of the accused, we were directed to proceed, although there were certain reasons that appeared to us which might make it a little questionable. Notwithstanding that we were directed to proceed, and we have proceeded, under the ruling of the Commissioner, when we were notified that after we had he would do nothing until the opinion of the Supreme Court of the United States, and that he would not take the case for final submission until that time.

"MR. UNTERMYER: Ruling on what, Mr. Fox?

"MR. FOX: When I say 'his ruling,' his announcement, we will put it. Now, the counsel has taken this case to the Supreme Court. He has that right, and nobody objects or criticises in the slightest. Now, if he is able to obtain from the Supreme Court a decision sustaining his views, it may be accompanied by some qualifications and suggestions from that great court that will make it necessary for us to introduce other proof, and as the case is not to be decided until that decision, I cannot see how the accused is prejudiced in the slightest degree,

"THE COMMISSIONER: I understand Mr. Fox to say

he considers his case closed unless something he knows not of occurs.

" MR. UNTERMYER : Then, as at present advised, as I understand it, the complainant's case is closed. That being so, Mr. Commissioner, we very respectfully insist that, upon the proof submitted, the offense is not extraditable, and we ask you to dismiss the proceeding.

THE COMMISSIONER : The Commissioner again refuses to consider that question until the opinion of the Supreme Court is announced upon the matter now pending before it."

* * * * * * *

MR. UNTERMYER : Carrying out that line of action, what does the Commissioner propose to do with the case ?

THE COMMISSIONER : Adjourn the case until the Supreme Court has decided the matter now before it.

MR. UNTERMYER : That might be for months. That might carry it over until next autumn by a division of the Court, and this defendant remain in jail all that time.

THE COMMISSIONER : That is the position your action has placed the defendant in.

MR. UNTERMYER : We certainly had a right to raise the question by *habeas corpus* and to go to the Supreme Court. Now they have put in another complaint. It is their action that has placed the defendant in that position. They have a man arrested upon a complaint, and when we ask to raise the question of the sufficiency of the complaint before the courts, they take out another warrant and make another charge. I do not quite see how it is our action. I can quite see how it is theirs.

THE COMMISSIONER : As long as the proceeding is pending in the Supreme Court, the prisoner cannot complain of being restrained in jail by this proceeding. It is the proceeding in Washington, in the Supreme Court, under which he is directly held under arrest."

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POINTS.

I.

The prisoner having regularly appealed to this Court on a record presenting the questions of the right of extradition and the right to give bail, the jurisdiction of this Court to entertain such appeal is not affected by the fact that the demanding government announced its willingness that he should be discharged under the warrant of March 16th, 1903, its application for the withdrawal of such warrant having been denied by the Commissioner.

The demanding government is not here as an appellant. It is not in a position to review the correctness of the Commissioner's ruling that he could not discharge the prisoner from arrest under the warrant of March 16th. He repeatedly and consistently refused to discharge the prisoner, and declared him to be under arrest by virtue of that warrant.

Not only did he decline to permit the withdrawal of the warrant of March 16th, but he declined to determine the questions arising under the warrant of March 31st because of the pendency in this Court of the present appeal, by which it is sought to have determined questions which will be decisive of all essential propositions which will arise under the warrant of March 31st.

The warrant of March 16th has, therefore, been sustained by the Commissioner and by the United States Circuit Court in the first instance, and the Commissioner has declined, in any manner, to interfere with

that warrant. The appellant comes before this Court a prisoner under this warrant, and asks that the questions presented by the record, which involve the interpretation of the extradition treaties between the United States of America and the United Kingdom of Great Britain and Ireland be passed upon.

He has done no act which precludes this Court from passing on these questions. He has been guilty of no fault, and has initiated no steps which prevent this Court from proceeding to judgment, or which render it impossible to grant him effectual relief.

The expression of a willingness on the part of the demanding government to withdraw the warrant of March 16th, was in the nature of a motion to enter a *nolle prosequi*. But the Commissioner did not permit the warrant to be withdrawn, and it is still in full force.

It is well settled that unless such a motion is allowed by the court or tribunal to which it is addressed, it has no efficacy whatever.

In *United States vs. Schumann (7 Sawyer, 439)* the prisoner was brought before a United States Commissioner for examination upon a charge of having committed a public offence against the laws of the United States. The District Attorney proposed before the examination was completed to dismiss the proceeding. The Commissioner applied to Judges FIELD and HOFFMAN, then holding the Circuit Court, for their opinion as to the power of the District Attorney to do so, and it was decided that he did not possess the power; that on such an examination he attends only as the counsel for the government to present evidence against the accused, and has no control over the course to be pursued.

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Speaking of the powers of the Commissioner, Mr. Justice FIELD said:

"He is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offence against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for the government and for the accused; and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duties in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government; nor is he subject to any other's control. The district attorney may appear before the commissioner, and attend to the presentation of the evidence—but in that position he is only counsel of the government; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the persecution has been abandoned by the legal officer of the government. Still, there may be cases where he will be justified, and more, bound to take such a course. While the charge is under investigation, before either the commissioner or the grand jury, the district attorney has no absolute power over the case."

This decision was cited with approval in *U. S. vs. Ebbs, 10 Fed. Rep., 369.*

Certainly the counsel for the demanding government, who does not possess the authority of a District Attorney, has no greater control over proceedings pending before a United States Commissioner than a District Attorney, who is a sworn officer of the United States, would have.

In People vs. McLeod (1 Hill, 465) the power to direct the entry of a *nolle prosequi* was considered, and it was held that the District Attorney was not empowered to *nol. pros.* any criminal charge, or in any

other way discontinue or abandon it, without leave of the Court having jurisdiction to try the offense.

In other words, it was decided that the tribunal before which the case was pending, possessed the power of veto against a *nolle prosequi*.

The *New York Code of Criminal Procedure* contains two sections on the subject, which indicate that the same views still prevail in that State. They are the following:

"671. The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed.

"672. The entry of a *nolle prosequi* is abolished, and neither the attorney general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in the last section."

In *State vs. Klock (48 La. Ann.; s. c. 18 So. Rep.. 942)*, it was held that the power of the District Attorney to enter a *nolle prosequi* was subject to two limitations, (1) after the jury has been empaneled and the charge read he cannot discontinue if the defendant insists upon a verdict; (2) after a verdict and refusal to grant a new trial he is without authority to dismiss the prosecution without authority of the Court.

To the same effect are:

Statham vs. State, 41 Ga., 511.
Ex parte Donaldson, 40 Mo., 149.
State vs. Roe, 12 Vt., 93.

II.

The fact that the demanding government is now willing to consent to a discharge of the appellant from custody under the war-

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rant of March 16th, 1903, should not, under the circumstances, deprive him of his right to have the important questions of law which affect his liberty determined on this appeal.

(1) The demanding government is not a party to this appeal.

(2) Its offer amounts to a mere attempt to avoid and postpone the determination of the question of the extraditability of the appellant for the offense charged in the complaint and warrant which are a part of the record and which, so far as the charge of making, circulating and publishing a false account is concerned, is identical with that described in the warrant of March 31st, 1903.

(3) It likewise seeks to postpone indefinitely a determination as to the right of the appellant to be admitted to bail.

(4) The offer of the demanding government does not amount to a consent that the appellant should have judgment on the merits of the controversy which is presented by this appeal.

(5) If these proceedings were now dismissed, and the appellant were required to institute new proceedings under the complaint and warrant of March 31st, it would be impossible to present the case before this Court until the October Term, 1903, and in the meantime he would be kept in custody, unable to obtain a favorable adjudication either on the merits or on his right to be admitted to bail in view of the opinion rendered by Judge LACOMBE.

The affidavit on which the application for a dismissal is made is verified April 22d, 1903, and was only called to the attention of appellant's counsel on April 24th, 1903. In the meantime the Commissioner had declined to permit a withdrawal of the warrant of March 16th; had refused to pass on the merits of the charge described in the warrant of March 31st; the appellant had taken his appeal to this Court, and the cause had been advanced on notice to the demanding government, and stood ready for argument. The appellee has likewise prepared a printed brief on the merits.

To dismiss these proceedings at this stage would be unjust to the appellant and deprive him of substantial rights. To deny the application of the demanding government would in nowise affect its rights, since the assignments of error present for review no other questions than those of the interpretation of the treaty between the United States and Great Britain and of the power of the tribunals below to admit a prisoner, arrested in extradition proceedings, to bail.

Assuming, but not conceding, that this Court could on this state of the record decline to exercise its jurisdiction, it is submitted that following the analogies of courts of law where a plaintiff seeks to submit to a voluntary non-suit, and of courts of equity where a complainant moves for the dismissal of his bill, and the decisions which have been rendered on such applications, the appellant should not at this stage of the case be turned out of court, since he would thereby be deprived of the right of a speedy hearing, and would, as we believe, be subjected to an unwarranted and protracted deprivation of his liberty.

In *Chicago & Alton R. R. Co. vs. Union Rolling*

Mill Co. (*109 U. S., 702*), in a suit in equity, one of the defendants, having answered setting up his particular rights, filed a cross-bill to enforce them, and an interlocutory decree was entered to protect and enforce his rights thus set up. The complainant in the original suit then sought to dismiss his bill under the Thirty-eighth rule, for failure to reply to the plea interposed by another of the defendants. It was held that the complainant could not thus dismiss the bill against the objection of the defendant.

Mr. Justice Woods, speaking for the Court, said:

"The appellants contend that Dumont, the original complainant, had the right at any stage of the case, to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

"It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well-settled exception—namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

"The rule is stated as follows in Daniell's Chancery Practice, page 793, 5th Am. Ed.:

"'After a decree or decretal order the Court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.'

"The same writer, page 794, says, that,

"'After a decree has been made, of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill.'

" 'The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the Lord Chancellor in *Cooper vs. Lewis, 2 Phillips Ch., 181*, as follows:

" 'The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted. It is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff.'

" In *Bank vs. Rose, 1 Rich. Eq. (S. C.), 294*, it was said:

" 'But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted.'

" So in the case of *Connor vs. Drake, 1 Ohio St., 170*, the Supreme Court of Ohio declared:

" 'The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defense, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them, merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill.'

" Chancellor WALWORTH, in the case of *Wall v. Crawford, 11 Paige, 472*, laid down the rule in these words:

" 'Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in

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the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court.'

"See, also, Guilbert v. Hawles, 1 Ch. Cas., 40; Bluck v. Colnaghi, 9 Sim. Ch., 411; Lashley v. Hogg, 11 Ves. Jr., 602; Booth v. Leycaster, 1 Keen's Ch., 255; Biscoe v. Brett, 2 Vesey & B., 377; Collins v. Greaves, 5 Hare, 596; Gregory v. Spencer, 11 Beav., 143; Carrington v. Holly, 1 Dick., 280; Anon., 11 Ves. Jr., 169; Cozzens v. Sisson, 5 R. I., 489; Opdyke v. Doyle, 7 R. I., 461; The Atlas Bank v. The Nahant Bank, 23 Pick., 491; Bethia v. M'Kay, Cheve's Eq. (S. C.), 96; Sayer's Appeal, 79 Penn. St.; Seymour v. Jerome, Walk. Mich. Ch., 356."

In *Stevens vs. Railroads (4 Fed. Rep., 97)*, it was held that the plaintiff would not be allowed to voluntarily dismiss his bill without prejudice to the bringing ing of another suit, unless the circumstances were such that the Court would, upon final hearing, permit the bill to be so dismissed; that it would not be allowed when by such dismissal the plaintiff would prejudice the defendant and deprive him of some substantive right; that this exception was not confined to rights acquired by some order or decree entered in the case, but may arise out of any proceeding in it, and may be based on the nature of the defense, the condition of the pleadings, the agreement of the parties, or any circumstance appearing in the record which shows that it would be inequitable to allow the dismissal.

The opinion proceeds on the authority of *Booth vs. Leycester, (1 Keen, 247, 255)* and *Hooper vs. Lewis (2 Phillips, 177)*.

In *Electric Accumulator Co. vs. Brush Electric Co. (44 Fed. Rep., 602)*, decided by Mr. Justice BROWN in 1890, an application by the complainant to dismiss his suit, which had been pending for several years and in which the defendant sought affirmative relief by

answer but had failed to file a cross-bill, was denied. The opinion of Judge HAMMOND in *Stevens vs. Railroads (supra)* was referred to as "a most satisfactory opinion," and the Court proceeds to say:

"Where defendant sought to dismiss his cross-bill after the original and cross-bill had been set down to be heard together; the court remarking that the plaintiff could not dismiss his bill when by so doing he might prejudice the defendant: *Booth v. Leycester, 1 Keen, 247.* Where a general demurrer had been overruled upon argument, and defendant had appealed: *Cooper v. Lewis, 2 Phil. Ch., 178.* After an order to account and a report has been made: *Bethia v. McKay, Cheves Eq., 93,* overruling *Bossard v. Lester, 2 McCord Eq., 419.* Or where a cross-bill was filed to a bill of foreclosure: *Bank v. Rose, 1 Rich. Eq., 292;* the court observing that 'whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit, and making his proofs anew, such dismissal will not be permitted.' * * *

"Upon a full examination of all the cases upon this subject we have come to the conclusion that leave to dismiss a bill should not be granted where, beyond the incidental annoyances of a second litigation upon the same subject matter, such action would be manifestly prejudicial to the defendant. In the case under consideration the litigation has been pending for three years and a half. The defendant is entitled under his answer to an affirmative decree declaring the invalidity of the plaintiff's patent, in case it succeeds in establishing the priority of its own. Relying upon this, it has neglected to institute a cross-cause, and to allow this bill to be dismissed would be virtually to shorten the life of its patent for the time this litigation has been pending. Indeed, as the very object of the statute is to save the necessity of two suits it will be manifestly unjust to permit either party to put an end to the litigation by dismissing its own bill."

In *Manufacturing Co. vs. Waring (46 Fed. Rep., 87)*, Judge LACOMBE held that a complainant was not entitled of right to dismiss his bill after the answer is filed,

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setting up that the license to use a patent upon which the suit is brought is fraudulent and void.

In *Western Union Tel. Co. vs. American Bell Tel. Co. 50 Fed. Rep., 662, 664*), the rule is stated by Judge COLT as follows :

"Under that practice (*i. e.*, the English Chancery practice before 1845) the general rule was that a complainant might dismiss his bill upon payment of costs at any time before interlocutory or final decree; and this has been the general practice both in the federal and state courts. There are, however, certain well recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that the complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances, where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against the second suit ; but it means that if, during the progress of the case, the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill."

In *City of Detroit vs. Detroit City Ry. Co.* (*55 Fed. Rep. 569*), a suit was brought to declare the rights claimed by the defendant under a franchise from the City of Detroit void, and praying that the right of the company to use the city streets be declared ended after 1893. The railway company alleged the validity of its franchise, and asked that the city be restrained from interfering with the operation of the railroads. After the suit had been removed into the Federal Court

from the State Court, in which it had been instituted, the complainant moved to dismiss the bill. The application was denied, Judge TAFT saying:

"It seems hardly fair that after a case has been got ready for hearing and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of the benefit of all that preparation by dismissal, under which he reserves full power to harrass him by bringing a new bill when he shall choose to do so, on the simple condition, that he pay the costs, which are so notoriously inadequate to compensate defendant for his actual expenditures. * * * If we dismiss the bill, it would seem that under the decision in Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S., 702, 3 Sup, Ct. Rep., 594, the cross-bill would fall too; and the question is whether this would prejudice the defendant railway company. We think it would, under the authorities already cited. Moreover, an affidavit has been filed in which it is alleged (and the allegation is not denied) that this litigation has prevented the sale of its bonds, and also that in the short time, during the coming year, if it is to enjoy the franchise it claims, it will have to expend a large amount of money—more than half a million dollars—in the improvement of the streets, and of the motive power of its cars. We think it may, on this state of facts, rightfully say that it would be prejudiced by a discontinuance of this suit. Thereby it would be required to bring another bill to assert the same right to affirmative relief it now claims, and the ordinary delays in litigation would delay the decision on such new bill until after the time when this franchise is said to terminate. It is naturally of paramount interest to it, under the circumstances, to know as soon as possible what its rights are in the streets."

To the same effect is *Hershberger vs. Blewett, 55 Fed Rep., 170.*

In *Lewis vs. Cooper (16 L. J. Ch., N. S., 265)*, it was held that after a defendant has appealed from an order overruling a demurrer in the cause the plaintiff cannot dismiss as of course.

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In *Folger vs. The Robert G. Shaw* (*2 Woodbury & Minot, 537*), where an application to dismiss had been made after an appeal had been taken in the case, Judge WOODBURY, denying the application to dismiss, said:

"The true test seems to be the progress in the case, so that the court have means to decide on the merits. The defendant then has rights and may well insist on a final judgment to avoid further expense and litigation. Thus it often happens in the Supreme Court of the United States on an appeal that the court, when one side does not appear, proceed to hear the other, and render judgment on the merits (*U. S. v. Palmer, 3 Wheat., 626*). And by the thirtieth rule of that court either party can claim a hearing and decision on the merits, because in that court no new testimony or pleadings generally take place, and the case is in a state to be heard and decided on the merits whenever it is entered. Looking to this condition of things as the general test, whether in a court of original or appellate jurisdiction, it settles the question whether of right the plaintiff can be non-suited or not. Nor is a discontinuance allowed, except for special cause, after a rule for judgment on a demurrer or on pleas for like reasons, as then the merits can be decided and the defendant them has gone far enough to claim final judgment on the controversy."

In *Beery vs. Chicago, &c., R. R.* (*6 4Mo., 533*), it was held that a nonsuit cannot be taken in the State court after the proper application has been made by the defendant for the removal of the action to the Federal court.

In *Browning vs. Chrisman* (*30 Mo., 353*), it was held that discontinuance would not be allowed when it would produce any derangement in the rights of the defendants, or subject them to increased difficulties or liabilities.

Whenever a defendant is wrongfully dispossessed of his land by legal process he is entitled to a writ of restitution and an inquisition of damages in that

action, of which the plaintiff is not permitted to deprive him by taking a nonsuit.

Lane vs. Morton, 81 N. C., 38.

The plaintiff will not be permitted to discontinue his suit when it will give him an advantage or tend to vex and oppress the defendant.

Mechanics' Bank vs. Fisher, 1 Rawle, 341.

The only effect of granting the application of the demanding government would be to continue indefinitely the imprisonment of the appellant; to deprive him of the opportunity which is now afforded him of obtaining a prompt interpretation of the treaty, and of his right to bail; to increase his expense; to vex and annoy him; to render it necessary to renew the proceedings, which are ripe for decision.

If the demanding government can thus deprive the appellant of his right to be heard in this Court by the procedure now resorted to, the same tactics may be employed should it for any reason be deemed desirable to withdraw the warrant of March 31st, or any succeeding warrant that may be procured. In other words, the appellant could not have his day in Court without the consent of the demanding government, and only by its grace.

The appellant's procedure has been regular. His resort to the writ of *habeas corpus* to regain his liberty has the highest sanction. He has appealed to this Court, pursuant to statutory authority. He has done nothing to change his status as a petitioner for judicial relief. And yet, because the demanding government—not even the appellee—seeks arbitrarily to interfere with his regular, and orderly proceedings, by an offer, which cannot inure to the appellant's benefit, made

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after the jurisdiction of this Court has attached, it is sought to deprive him of an adjudication by this Court on the merits of the appeal.

III.

It is respectfully submitted that jurisdiction should not be declined.

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Appellant's Counsel.

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OCTOBER TERM, 1902.

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JAMES H. McKENNEY,
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vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., APPELLEES.

APPELLANT'S BRIEF IN REPLY TO THE SOLICITOR GENERAL.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Appellant's Counsel.

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